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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 337

ARMAND TOKATYAN,

Petitioner,

against

MAX CHOPNICK,

Respondent.

PETITIONER'S REPLY BRIEF

LOUIS P. RANDEL,
Attorney for Petitioner.

BENJAMIN PEPPER,
Of Counsel.

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POINT I

There is a conflict between the Circuit Courts of Appeal as to whether the denial of a discharge in bankruptcy because of a prior discharge within six years, acts as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of the six years.

Despite the assertion by respondent's counsel in their brief to the contrary, a reference to the decision of the Circuit Court below, shows that Judge Swan who wrote the decision expressly recognized that there was a conflict between the *McCausland* case which the Court below followed and the *Prudential Loan & Finance Company* case.

In his opinion he said:

> "*Prudential Loan & Finance Co.* v. *Roberts*, 52 F. 2d 948 (C. C. A. 5) is to the contrary and Prof. Moore

> thinks it preferable to the *McCausland* decision. 1 Collier on Bankruptcy (14th ed.) page 1371. Cf. 45 Harv. L. Rev. 1110. We respectfully disagree and believe that the appellant's claim was not dischargeable in the third bankruptcy; consequently it was wrong to stay prosecution of it in the state court."

Since the decision of the Court below is likewise contrary to the decision of the Circuit Court of Appeals, 5th Circuit, in the *Prudential Loan & Finance Company* case, we have a direct conflict in the decisions between both Circuit Courts, on a question which has repeatedly arisen in numerous cases many of which are cited in the briefs of counsel in the instant case.

We respectfully submit that in view of this conflict of decisions, the writ should be granted so that this court can pass upon the question and decide which of the conflicting decisions correctly states the law. Otherwise, the question as to whether a bankrupt is entitled to a discharge under the circumstances existing in the present case remains in doubt, depending on whether a court follows the decision of the Circuit Court of Appeals in the 2nd Circuit or that of the Circuit Court of Appeals in the 5th Circuit.

The distinction attempted by respondent's counsel at pages 6 to 8 of their brief, between the cases relied upon by petitioner and the instant case, is without merit. For while it may be that in none of those cases was there a final order denying the discharge, an examination of the decisions in those cases (which have already been set forth under Point I of our main brief) shows that the circumstance of whether a discharge had been applied for or whether the previous proceeding had been closed or dismissed, could have had no bearing on the decision of the Court in those cases.

Nothing can be clearer or more direct than the statement by the Circuit Court in the *Prudential Loan & Finance Company* case (52 Fed. (2d) at page 920):

> "We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge

> is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years."

While the case of *In Re Perry* does make a distinction between a dismissal of a proceeding and a denial of a discharge, we submit that this distinction is without force, in view of the definite statement of the law in the *Prudential Loan & Finance Company* case, already referred to. Under this statement of the rule of law, it makes no difference whether the previous bankruptcy proceeding was dismissed or a discharge denied, provided that the denial of the discharge was on the sole ground that six years had not elapsed since a prior discharge.

The objection by respondent's counsel at page 8 of their brief that if a consideration of reasons was required as to every order denying a discharge there would be no finality to such an order without an examination of the ground upon which such order was predicated, is without force. For it is easy enough to look at the Court records of the prior proceedings which will disclose the reason for the previous denial of a discharge. If the records show that the discharge was denied merely because of the six year limitation, it would be apparent that an application for a discharge in a subsequent proceeding after the six year period had elapsed, was not barred.

In this connection, we call the Court's attention to the following statement of the Court in the *Prudential Loan & Finance Company* case (52 F. (2d) at 920):

> "The purpose in adding the ground relating to a prior discharge within six years was not to punish, but only to postpone a second discharge for that period of time."

This gives point to the contention advanced by us under Point I of our main brief, that the fact that a proceeding in bankruptcy was prematurely instituted should not act as an adjudication on the merits barring a discharge in a subsequent proceeding timely brought.

CONCLUSION

The application for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS P. RANDELL,
Attorney for Petitioner.

BENJAMIN PEPPER,
of Counsel.